Qwest
1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303 383 6648
Facsimile 303 383 8482
Andrew.Crain@qwest.com

Andrew D. Crain
Vice President & Deputy General Counsel
Law Department

VIA ECFS

EX PARTE

September 24, 2008

Ms. Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W.
Washington DC 20554

Re: *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic; Developing a Unified Intercarrier Compensation Regime*, CC Docket Nos. 96-98, 99-68 and 01-92

ISP Reciprocal Compensation

Dear Ms. Dortch:

Qwest Communications International Inc. ("Qwest") submits this memorandum to address issues pertinent to the above-referenced dockets. Below, Qwest makes the following points regarding ISP reciprocal compensation in the context of the Commission's efforts to reform intercarrier compensation in a comprehensive manner:

(1) In the event the Commission does not implement comprehensive intercarrier compensation reform by November 5, 2008, it must at the least respond to the Court of Appeals mandamus order and resolve issues surrounding compensation for ISP-bound calls.

(2) Whether or not the Commission implements comprehensive intercarrier compensation reform by November 5, 2008, it must ensure that its decision has no unintended retroactive consequences regarding ISP-bound traffic.

(3) While Qwest agrees that the optimal resolution to the ISP reciprocal compensation issue is within the context of comprehensive intercarrier compensation reform, in the absence of such reform there are various legal means by which the Commission may resolve the ISP-bound traffic controversy in isolation.

I. In the Event Comprehensive Intercarrier Compensation Reform Proves Elusive, the Commission Must at the Least Address the Treatment of ISP-Bound Traffic.

The D.C. Circuit has ruled that the current rules governing compensation for ISP-bound traffic will be vacated if the Commission does not respond to the court's 2002 remand by November 5, 2008. [1] Qwest recognizes that the Commission intends to address this issue in the context of broader reform on or before that date, and supports this goal. However, Qwest stresses that, in the event broader reform proves elusive, the Commission should take all possible steps to resolve the controversy surrounding ISP-bound traffic. Vacatur of the current rules without implementation of an adequate substitute would result in an economically inefficient regime that the Commission has repeatedly found promotes opportunistic arbitrage rather than the public interest. There is no legal or policy basis for reinstituting this failed regime.

The Commission has on multiple occasions determined that the application of otherwise-applicable reciprocal compensation rates (that is, those generally applicable to voice traffic under the structure that existed in 2001) to ISP-bound traffic is contrary to the public interest. The *ISP Remand Order*[2] held that application of reciprocal compensation rates to ISP-bound traffic gives rise to "a substantial opportunity for regulatory arbitrage," "undermines the operation of competitive markets,"[3] "create[s] opportunities for regulatory arbitrage and distort[s] the economic incentives related to competitive entry into the local exchange and exchange access regime,"[4] and "create[s] severe market distortions."[5] Prior to 1999, the application of reciprocal compensation to this traffic "created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition" and "made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels."[6] In contrast, the Commission found, "requiring carriers to recover the costs of delivering traffic to ISP customers directly from those customers is likely to send appropriate market signals and substantially eliminate existing opportunities for regulatory arbitrage,"[7] curtailing a "pressing problem."[8] The Commission reiterated these findings in the 2004 *Core ISP Forbearance Order*,[9] which evaluated Core Communications' ("Core") request for forbearance from application of the *ISP Remand Order*'s framework and its

---

[1] *See In re: Core Communs., Inc.*, 531 F.3d 849 (July 8, 2008).

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

[3] *Id.* at 9183-84 ¶ 71.

[4] *Id.* at 9162 ¶ 21.

[5] *Id.* at 9185-86 ¶ 76.

[6] *Id.* at 9162 ¶ 21.

[7] *Id.* at 9181 ¶ 67.

[8] *Id.* at 9188 ¶ 81.

[9] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179 (2004) (subsequent history omitted) ("*Core ISP Forbearance Order*").

request for a return to voice-rate reciprocal compensation for ISP-bound calls. There, the Commission determined that ISP-bound traffic rate caps "were designed to send more accurate price signals and substantially reduce market distortions,"[10] and that they "remain[ed] necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications services and facilities."[11] In reviewing the *Core ISP Forbearance Order*, the D.C. Circuit noted that Core had offered "no ground for concluding" that the economic analysis underlying the ISP-bound traffic rate cap was "unreasonable."[12]

Nothing has happened to make these findings and conclusions any less accurate today than they were upon adoption. Vacatur of the existing ISP-bound traffic regime would simply reinstitute the discredited framework that the Commission has repeatedly repudiated. The Commission should ensure that this outcome does not come to pass.

II. Whether or Not the Commission Implements Comprehensive Intercarrier Compensation Reform, It Must Ensure that Its Decision Has No Unintended Retroactive Consequences on Past ISP-Bound Traffic.

Irrespective of whether the Commission implements comprehensive intercarrier compensation or addresses ISP-bound traffic alone, it will need to ensure that its decision is not misread to work a retroactive change in the rules governing compensation for ISP-bound calls in the period following the D.C. Circuit's 2002 remand. While the comprehensive solutions to the intercarrier compensation issue currently under consideration should, as the Commission anticipated in the *ISP Remand Order,* resolve the unique issues presented by ISP-bound calls on a forward-looking basis, it is possible that ISP-serving LECs such as Core will claim a separate right to retroactive vacatur of the *ISP Remand Order* framework, and seek damages or other compensation based on that purported retroactivity. Similar arguments might well follow any Commission order addressing ISP-bound calls in isolation. In other words, ISP-serving LECs may argue that the very regime which the Commission has regularly rejected as being contrary to public policy must be applied to traffic predating the effective date of any order of the Commission resolving ISP reciprocal compensation going forward. In addition to resurrecting the inefficiencies detailed above, this outcome could result in protracted and complex litigation as providers warred over the proper rates for calls long since completed.[13]

Some of the proposals before the Commission (regarding ISP-bound traffic specifically and intercarrier compensation generally) would preclude arguments of this sort. To the extent the Commission adopted a rationale proving that its approach to ISP-bound traffic was and always had been lawful, that rationale should preempt any claims that the *ISP Remand Order* had somehow been "un-vacated." Other rationales, on the other hand, might be read to suggest that

---

[10] *Id.* at 20185-86 ¶ 18.

[11] *Id.* at 20186 ¶ 19.

[12] *In re: Core Communications, Inc.*, 455 F.3d 267, 279 (D.C. Cir. 2006).

[13] Presumably the only such provider with any claim to retroactive rights would be Core itself, but that reality would not reduce the number or aggressiveness of potential claimants.

the current regime was never lawful. But whichever rationale it adopts, the Commission should err on the side of caution, and foreclose disputes over long-forgotten calls. Specifically, it should make clear in any prospective order that its action is not intended to work a retroactive vacatur of the *ISP Remand Order*. Specifically, the Commission should state that its decision should not be understood to abrogate the contracts that have governed ISP traffic since 2001 – typically interconnection agreements negotiated and/or arbitrated under section 252 of the Act.[14] Rather, such agreements should be governed by their own language, and renegotiated or amended only to the extent contemplated by their change-of-law provisions or other terms. Such action will help ensure that the FCC's ultimate resolution of intercarrier compensation would not be affected by its ISP-specific actions in response to the D.C. Circuit's remand.

The approach Qwest urges here would be analogous to the approach the Commission pursued with regard to local circuit switching in its *Triennial Review Remand Order* ("*TRRO*").[15] Prior to that Order's issuance, the Supreme Court and D.C. Circuit had on three occasions remanded, and in two of three cases vacated, Commission rules mandating unbundling of the local switching element.[16] The *TRRO* held that this element would not be subject to section 251(c) unbundling.[17] At that point, of course, incumbent LECs had been making switching available to competitors as an unbundled network element for eight years, subject to below-market TELRIC rates, notwithstanding the fact that this requirement was never supported by a sustainable legal rationale. Even under these circumstances, the Commission did not propose any retroactive adjustment of the payments made to incumbent LECs over those eight years, which – like the charges at issues here – were governed by section 252 interconnection agreements. Rather, the Commission held that changes to its rules would be effectuated in those agreements only prospectively, unless otherwise stated in an individual agreement's change-of-law provisions.[18] This is precisely the approach that the Commission should embrace with regard to compensation for ISP-bound traffic.[19]

---

[14] 47 U.S.C. § 252.

[15] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005).

[16] *See United States Telecom Association v. FCC*, 359 F.3d 554, 571 (D.C. Cir. 2004) (vacating Commission's 2003 switching rules); *United States Telecom Association v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (remanding 1999 unbundling rules, including switching rules); *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 857 (1999) (vacating 1996 unbundling rules, including switching rules).

[17] *TRRO*, 20 FCC Rcd at 2641 ¶ 199.

[18] *See id.* at 2659 ¶ 227, 2665 ¶ 233. The Commission overrode interconnection agreements in several respects, none of which had any retrospective effect: It precluded competitive LECs from purchasing new unbundled local switching arrangements following the *TRRO*'s effective date, *see id.* at 2659 ¶ 227, required all change-of-law processes to conclude within a year of that date, *see id.*, and modified the pricing terms applicable during that year, *see id.* at 2660-61 ¶ 228.

[19] It is doubtful that the Commission could abrogate existing interconnection agreements with respect to ISP-bound traffic even if it wanted to. Under the long-standing *Mobile-Sierra* doctrine, an agency may abrogate a utility contract "only if the public interest so requires." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 709 (D.C. Cir. 2000). *See generally FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.*

III. If the Commission Does Not Resolve the Larger Intercarrier Compensation Issues by November 5, 2008, There Are Numerous Legal Means by Which it May Resolve the ISP-Bound Traffic Controversy On an Individual Basis.

The Commission has ample authority to deal with the ISP reciprocal compensation issue prior to November 5 even if it chooses not to complete the comprehensive intercarrier compensation reform that is currently underway. While Qwest would prefer a comprehensive approach to intercarrier compensation, it takes this opportunity to note several approaches open to the Commission in addressing ISP-bound traffic alone.[20]

A. The Commission Can Determine that ISP-Bound Traffic is Non-Local and Therefore Falls Outside the Reach of Section 251(b)(5).

Neither the D.C. Circuit nor any other court has rejected the central legal rationale underlying the Commission's original *ISP-Bound Traffic Order*.[21] While the *Bell Atlantic* court remanded that decision, it made clear that it did not disagree with its central premise – namely, that section 251(b)(5) only applied to termination of local traffic unless the Commission expanded its scope by valid order. The court simply demanded that the Commission provide a "real explanation for its decision to treat [the] end-to-end analysis as controlling" with regard to intercarrier compensation.[22] Likewise, in *WorldCom v. FCC*,[23] the D.C. Circuit rejected the *ISP Remand Order*'s approach,[24] but emphasized that it was *not* vacating the *ISP Remand Order*'s framework, nor was it ruling on "the scope of the 'telecommunications' covered by § 251(b)(5)" or doubting the Commission's authority to adopt bill-and-keep with regard to ISP-bound traffic.[25] Indeed, during oral argument in *WorldCom*, two judges actively disputed the claim that the *Bell Atlantic* court had rejected the applicability of the end-to-end approach.[26] Thus, in order to reaffirm the *ISP-Bound Traffic Order*'s central rationale, the Commission need only respond to the logical deficiencies determined by the *Bell Atlantic* court.

In the 1996 *Local Competition Order*, the Commission "conclude[d] that section 251(b)(5) reciprocal compensation should apply only to traffic that originates and terminates

---

v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956). In light of the well-recognized harms wreaked by application of reciprocal compensation rates to ISP-bound traffic, discussed above, the public interest does not require retroactive application of those rates here.

[20] Qwest notes that while each of these options favors a $0.0000 per-minute rate for ISP-bound traffic, each would permit retention of the current $0.0007 rate as part of a transition to the new regime.

[21] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*ISP-Bound Traffic Order*").

[22] *Id.* at 8.

[23] *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[24] *Id.* at 433.

[25] *See id.* at 434.

[26] Oral Argument Transcript, *WorldCom, Inc. v. FCC*, Nos. 01-1218, et al. (D.C. Cir. argued Feb. 12, 2002).

within a local area," and was "intended for a situation in which two carriers collaborate to complete a local call."[27] In the *ISP-Bound Traffic Order*, the Commission found that ISP-bound calls were jurisdictionally interstate and that section 251(b)(5) therefore did not apply unless parties agreed on that framework.[28] Reviewing this decision, the *Bell Atlantic* court expressed concern over (1) why the interstate classification precluded application of section 251(b)(5) and (2) whether ISP-related communications were in fact local or non-local. In order to respond to the *Bell Atlantic* court's questions, the Commission can and should explain that under the well-established "end-to-end" approach, a communication's beginning and ending points govern its treatment, not only for "jurisdictional" purposes but also for purposes of determining which compensation arrangements apply.[29] Under this analysis, ISP-bound traffic is interstate, not local. Under the prevailing interpretation of section 251(b)(5), this traffic is not subject to reciprocal compensation, but rather to rates established by the Commission pursuant to section 201 of the Act.[30]

B. The Commission Can Determine That ISP-Bound Traffic Imposes No "Additional Costs" on LECs That Terminate Calls to ISPs.

In the alternative, the Commission can hold that even if reciprocal compensation applies, the applicable per-minute rate for such traffic would be "zero" because this traffic imposes no "additional costs" on the ISP-serving LEC, as that term is used in section 252(d)(2)(A)(ii).

As the Commission has consistently recognized, LECs serving ISPs are compensated for the costs of delivering traffic to those ISPs principally through the charges they assess on the ISPs themselves. Since 1983, the Commission has exempted enhanced service providers

---

[27] *Local Competition Order*, 11 FCC Rcd 15499, 16013 ¶ 1034 (1996).

[28] *ISP-Bound Traffic Order*, 14 FCC Rcd at 3698 ¶ 12, 3706 ¶ 26 n.87.

[29] Commission decisions uniformly apply an end-to-end test to determine which compensation rules apply to particular traffic, not just the regulatory jurisdiction over the communication. This analysis has governed traffic involving intermediate switching platforms, Internet-bound traffic, voice over Internet protocol traffic, and calling card traffic, as well as ordinary telephone calls. *See, e.g.*, *Southwestern Bell Tel. Co. Transmittal Nos. 1537 and 1560*, 3 FCC Rcd 2339, 2341 ¶ 28 (CCB 1988); *Teleconnect v. Bell Tel. Co. of Pennsylvania*, 10 FCC Rcd 1626 (1995); *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, 577 ¶ 44 (1998); *id.* at 579 ¶ 47, 590-91 ¶ 80. *See also Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997); *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services*, 20 FCC Rcd 4826, 4827 ¶ 5 (2005). *See also Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7300 ¶ 27 (2006); *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, 22 FCC Rcd 17973, 17986 ¶ 34 (2007); *The Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services*, 11 FCC Rcd 1186, 1190 ¶ 29 (CCB 1995) ("[A] debit card call that originates and ends in the same state is an intrastate call, even if it is processed through an 800 switch located in another state."); *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22476 ¶ 19 (1998) ("*GTE ADSL Order*"). The Commission denied MCI's subsequent request for reconsideration on this issue. *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 17 FCC Rcd 27409 (1999).

[30] 47 U.S.C. § 201; of course, the Commission can change this status through a proper proceeding.

("ESPs") – including ISPs – from access charge payments in the context of interstate traffic,[31] reasoning that ESP-serving LECs are compensated by the ESPs themselves, which generally pay end-user local business rates and the federal subscriber line charge for access to facilities. "ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscription to incumbent LEC Internet access services."[32] In the years since the ESP exemption has taken hold – and especially the years since the Commission announced its policy exempting ISP-bound traffic from section 251(b)(5) – ISP-serving LECs have had more than ample opportunity to revise their rates to ensure recovery of costs associated with ISP-bound calls.[33] Under these circumstances, where LECs already receive compensation for the costs associated with delivering interstate traffic to ISPs, ISP-bound calls cannot be understood to impose any "additional" costs on the ISP-serving LEC, and the appropriate long-term per-minute reciprocal compensation rate is $0.0000 per minute.[34]

C. The Commission Can Forbear From Applying Traditional Reciprocal Compensation Rates to ISP-Bound Traffic.

The Commission could also include in any order language making clear that, to the extent a court strikes down its other rationales, the Commission forbears from application of sections 251(b)(5) and/or 252(d)(2) with regard to ISP-bound traffic.[35]

The Commission already has made the findings required under section 10(a) to justify forbearance from sections 251(d)(2) and/or 252(d)(2) to the extent they otherwise would apply to ISP-bound traffic. In the *ISP Remand Order*, the Commission held that application of the reciprocal compensation to ISP-bound traffic "undermine[d] the operation of competitive markets,"[36] "created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access regime;"[37] and "created

---

[31] *See MTS and WATS Market Structure*, 97 F.C.C. 2d 682, 715 ¶ 83 (1983); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305 ¶ 3 (1987).

[32] *Id. See also id.* ("To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high call volumes of incoming calls, incumbent LECs may address their concerns to state regulators.").

[33] This task will have been even less burdensome for the *competitive* LECs at issue in this docket than for the incumbent LECs envisioned by the Commission in the *Access Charge Reform Order*, because competitive LECs generally enjoy much greater flexibility than incumbents in setting retail rates.

[34] Of course, a Commission ruling along the lines described here would not require it to depart in the short run from the interim $0.0007 ISP traffic rate.

[35] The D.C. Circuit has made clear that the Commission is entitled to issue "conditional" forbearance rulings that only govern *to the extent* that an obligation would otherwise apply. *See AT&T v. FCC*, 452 F.3d 830 (D.C. Cir. 2006).

[36] *ISP Remand Order*, 16 FCC Rcd at 9183-84 ¶ 71.

[37] *Id.* at 9162 ¶ 21.

severe market distortions."[38] In 2004, the Commission affirmed these basic principles when it rejected Core's request for forbearance from various aspects of the ISP-bound traffic regime. In the course of doing so, it indicated that the *ISP Remand Order* regime remained necessary to ensure that rates remained just, reasonable, and in the public interest; to protect consumers; and to preserve the public interest.[39] On review, the D.C. Circuit found that these conclusions were reasonable and justified rejection of Core's request that ISP-bound traffic be subjected to ordinary reciprocal compensation rates.[40] Given these conclusions, under the section 10(a) standard, the Commission not only may but in fact *must* forbear from application of sections 251(b)(5) and 252(d)(2) to the extent they preclude application of this regime.[41]

* * *

Please do not hesitate to contact us to discuss this matter further.

Sincerely,

/s/ Andrew D. Crain

Copies to (via e-mail):
Christopher Killion (Christopher.killion@fcc.gov)
Daniel Gonzalez (Daniel.gonzalez@fcc.gov)
Amy Bender (Amy.bender@fcc.gov)
Nicholas Alexander (Nicholas.alexander@fcc.gov)
Greg Orlando (Greg.orlando@fcc.gov)
Scott Deutchman (Scott.deutchman@fcc.gov)
Scott Bergmann (Scott.bergmann@fcc.gov)
Dana Shaffer (Dana.shaffer@fcc.gov)
Albert Lewis (Albert.lewis@fcc.gov)
Jeremy Marcus (Jeremy.marcus@fcc.gov)
Marcus Maher (Marcus.maher@fcc.gov)
Randolph Clarke (Randy.clarke@fcc.gov)

---

[38] *Id.* at 9185-86 ¶ 76.

[39] *Core ISP Forbearance Order*, 19 FCC Rcd at 20184-89 ¶¶ 16-26.

[40] *In re: Core Communications, Inc.*, 455 F.3d 267.

[41] *See* 47 U.S.C. § 160(a) (Commission "shall forbear" when section 10(a) factors are satisfied).